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NUANCE COMMUNICATIONS, INC.

16 UNITED STATES DISTRICT COURT
17
18 NORTHERN DISTRICT OF CALIFORNIA

19 Abby USA Software House, Inc.

20 Plaintiff,

21 v.

22 Nuance Communications Inc.

23 Defendant.

) Case No.: CV-08-1035-JSW
)
) **DEFENDANT NUANCE**
) **COMMUNICATIONS, INC.'S REPLY**
) **IN SUPPORT OF ITS MOTION TO**
) **DISMISS CLAIMS SIX THROUGH**
) **NINE OF ABBYY USA'S AMENDED**
) **COMPLAINT**
)
) Date: October 3, 2008
) Time: 9:00 a.m.
) Judge: Hon. Jeffrey S. White
) Court: Courtroom No. 2
)
)

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1 **Summary of Argument Pursuant to Civil Standing Order Rule 6**

2 Abbyy USA's opposition to Nuance's opening brief offers no support to save its poorly
3 pleaded antitrust counterclaims.

4 **First**, Abbyy USA's fundamental argument is that it should be allowed to proceed to
5 discovery because it alleges that Nuance has a high market share in the "OCR Software" product
6 market. Even if it is true that Nuance has a high market share in a properly defined relevant
7 product market, that allegation by itself is irrelevant, and for Abbyy USA to argue that it is
8 dispositive misconstrues the central premise of our antitrust laws. The "mere possession of
9 monopoly power . . . is not only not unlawful; it is an important element of the free-market
10 system. . . . [T]he possession of monopoly power will not be found unlawful unless *it is*
11 *accompanied by an element of anticompetitive conduct.*" *Verizon Communications, Inc. v. Law*
12 *Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (emphasis added). Abbyy USA
13 cannot save its Complaint with market share allegations as it fails to adequately plead any
14 anticompetitive conduct by Nuance.

15 **Second**, Abbyy USA attempts to skirt antitrust pleading arguments by contending that its
16 counterclaims allege numerous anticompetitive acts. In essence, Abbyy USA argues that the
17 Court should excuse its poorly pleaded Complaint because it contains many allegations.
18 However, an insufficiently pleaded claim that relies on bare legal conclusions is not magically
19 rendered sufficient simply because it has been combined with other insufficiently pleaded claims.

20 **Third**, Abbyy USA does not explain how it has suffered antitrust injury. Several of the
21 claims allege simply that Nuance's actions "stabilized prices" or led to "higher prices" to the
22 "detriment of the consuming public." Competitors such as Abbyy USA cannot "recover damages
23 for any conspiracy by petitioners to charge higher than competitive prices, . . . [because] it could
24 not injure respondents: as petitioners' competitors, respondents stand to gain from any
25 conspiracy to raise the market price[.]" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
26 U.S. 574, 582-83 (1986).

ARGUMENT

I. ABBYY USA’S OPPOSITION FUNDAMENTALLY MISSTATES THE LEGAL STANDARDS UNDER THE ANTITRUST LAWS.

In its opening brief, Nuance explained in detail why each of Abbyy USA’s antitrust claims is insufficient to state a claim. In response, Abbyy USA urges the Court to ignore the flaws in its claims simply because Nuance did not refute that it has a high market share in the relevant market Abbyy USA alleged. Abbyy USA’s Opposition asserts that when its claims are “viewed with this presumed fact [high market share] in mind” the claims are “properly pleaded.” Opp. at 2.

This assertion runs counter to more than a century of antitrust jurisprudence. It is axiomatic that allegations of high market share alone are insufficient to state a claim under the Sherman and Clayton Acts. As the Supreme Court recently explained in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*:

[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless *it is accompanied by an element of anticompetitive conduct*.

540 U.S. at 407 (emphasis added); *see also United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 248 (8th Cir. 1988) (“[T]he mere possession of ... economic power is not unlawful. It is not mere monopoly (a status or condition), but rather monopolization (an activity) that Section 2 condemns.”) (citation omitted).

Thus, while market power is a necessary element of Sherman Act Section 2 claims, it is by no means sufficient to establish a violation. No matter how many times Abbyy USA recites Nuance’s “high market share,” that fact alone (even if true) cannot convert a poorly pleaded claim into a meritorious one. Absent sufficiently well-pleaded allegations of anticompetitive conduct—the *sine qua non* of a claim under the Sherman and Clayton Acts—Abbyy USA’s claims should be dismissed. *See, e.g., Dickson v. Microsoft Corp.*, 309 F.3d 193, 209 n.17 (4th Cir. 2002) (dismissing Sherman Act Section 1 and 2 claims against Microsoft where software manufacturer was alleged to have 90% market share in the personal computer operating software market and

1 80-90% share in the word processing and spreadsheet software markets); *White Mule Co. v. ATC*
2 *Leasing Co. LLC.*, 540 F. Supp. 2d 869 (N.D. Ohio 2008) (dismissing antitrust claims where
3 defendant had 70% of relevant market) (additional cases discussed throughout brief).

4 None of Abbyy USA's five conclusory allegations of anticompetitive conduct contains
5 facts sufficient to state a claim—indeed, they are nowhere close to satisfying the pleading
6 requirements demanded by the courts. Even under the liberal pleading standards of Federal Rule
7 of Civil Procedure 8(a)(2), a plaintiff must do more than recite the elements of the claim and must
8 “provide the ‘grounds’ of [its] ‘entitle[ment] to relief,’” which “requires more than labels and
9 conclusions.” *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1959 (2007) (citations omitted)
10 (second alteration in original). Moreover, the pleading must not merely allege that the conduct is
11 conceivable, but plausible. *Id.* at 1974. Abbyy USA's allegations do no more than recite labels
12 and conclusions and do not provide sufficient detail to make out a plausible claim.

13 Abbyy USA asserts that because *Twombly* involved allegations of conspiracy under
14 Section 1 of the Sherman Act, the pleading requirements set forth by *Twombly* somehow do not
15 apply to the set of facts here involving Abbyy USA's Section 2 claims. Abbyy USA's assertion
16 is incorrect. Numerous courts have held that conclusory allegations will not suffice in the context
17 of Section 2 claims. *See SmileCare Dental Group v. Delta Dental Plan of Cal., Inc.*, 88 F.3d 780,
18 783 (9th Cir. 1996) (dismissal of Section 2 claim appropriate “notwithstanding its conclusory
19 language regarding the elimination of competition”) (*quoting Rutman Wine Co. v. E. & J. Gallo*
20 *Winery*, 829 F.2d 729, 735 (9th Cir. 1987)); *Dickson*, 309 F.3d at 213 (“The pleader may not
21 evade [Rule 12(b)(6)] requirements by merely alleging a bare legal conclusion; ... Because
22 Gravity has failed to allege facts which, if true, would establish that the two licensing agreements
23 at issue are unreasonable restraints on trade that caused antitrust injury to consumers, its § 1 and §
24 2 claims fail as a matter of law.”) (alteration in original); *Syncsort Inc. v. Sequential Software,*
25 *Inc.*, 50 F. Supp. 2d 318, 328-29 (D.N.J. 1999) (considering Section 2 claims, the court explained,
26 “bare legal conclusions will not survive a motion to dismiss”).

27 In addition, courts have applied the analysis set forth in *Twombly* itself outside of the
28 context of Section 1 claims, and have relied on its framework to decide Sherman Act Section 2

1 and Clayton Act Section 7 claims as well. *See Port Dock & Stone Corp. v. Oldcastle NE, Inc.*,
2 507 F.3d 117, 121 (2d Cir. 2007) (applying *Twombly* pleading requirements to Sherman Act
3 Section 2 and Clayton Act Section 7 claims); *Iqbal v. Hasty*, 490 F.3d 143, 157 (2d Cir. 2007)
4 (“We are reluctant to assume that all of the language of [*Twombly*] applies only to section 1
5 allegations based on competitors’ parallel conduct or, slightly more broadly, only to antitrust
6 cases.”); *ATSI Commc’ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 n.2 (2d Cir. 2007) (“We have
7 declined to read *Twombly*’s flexible ‘plausibility standard’ as relating only to antitrust cases.”);
8 *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 458 (6th Cir. 2007) (applying *Twombly* to Section 2
9 claims). In any event, Abbyy USA agrees that “*Twombly* requires nothing more than a plaintiff
10 alleging facts sufficient to state a cause of action.” *Opp.* at 3.

11 Instead of explaining how its claims are sufficient to state a cause of action, Abbyy USA
12 tries to characterize the insufficiency of its pleadings as questions of fact to be resolved after
13 discovery. *See, e.g., id.* at 6 (suggesting that exclusive dealing claims must go to discovery
14 because the facts are in the hands of Nuance, where Abbyy USA has not alleged any degree of
15 foreclosure); *id.* at 7 (antitrust injury cannot be decided at the pleading stage when Abbyy USA
16 has not alleged that it suffered antitrust injury); *id.* at 10 (the question of “sham litigation” is to be
17 resolved on discovery when Abbyy USA has not alleged that Nuance engaged in “sham
18 litigation”), *id.* at 6-7 (“there is no requirement to provide evidence in the pleading, as Nuance
19 seems to demand here”). Abbyy USA’s assertion that Nuance “seems to demand” that Abbyy
20 USA “provide evidence in the pleading” is a red herring. *See id.* at 6.

21 Nuance has never suggested that Abbyy USA’s claims are insufficient because they are
22 not backed by evidence, although that may well be true. The point that Abbyy USA seems to
23 miss is that the law requires more than conclusory allegations in order to proceed to discovery. It
24 simply is insufficient to allege a variety of conduct which in the abstract violates the law without
25 any explanation as to how Nuance supposedly engaged in that conduct, and then insist that facts
26 supporting such bare conclusions will come during discovery. The law requires Abbyy USA to
27 provide Nuance with its basis for alleging that Nuance engaged in anticompetitive conduct, which
28 it has failed to do. Thus, it must explain in its claims, for example, that Nuance’s alleged

1 exclusive dealing resulted in foreclosure (it did not do so); that Nuance pursued objectively
 2 baseless litigation (it did not do so); that certain acquisitions provided Nuance with the ability to
 3 raise prices (it did not do so); or with which competitors Nuance entered into illegal agreements
 4 (it did not do so). *See Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*,
 5 459 U.S. 519, 526 (1983) (“It is not ... proper to assume that [plaintiff] can prove facts that it has
 6 not alleged or that the defendants have violated the antitrust laws in ways that have not been
 7 alleged.”). Abbyy USA’s conclusory allegations must be dismissed.

8 **II. ABBYY USA’S ARGUMENTS WITH RESPECT TO EACH OF ITS ANTITRUST**
 9 **COUNTERCLAIMS ARE FLAWED.**

10 **A. Sixth Claim**

11 Abbyy USA’s Sixth Claim for monopolization under Section 2 of the Sherman Act pleads
 12 five bare allegations of “predatory acts.” *See* 15 U.S.C. § 2. As explained in Nuance’s
 13 Memorandum of Points and Authorities in Support of Its Motion to Dismiss Claims Six Through
 14 Nine of Abbyy USA Software House (“Motion”), the allegations with regard to each “predatory
 15 act” are insufficient to state a claim. Perhaps recognizing the insufficiency of its claims, Abbyy
 16 USA now suggests that the “five specific acts, when taken together as part of a predatory scheme
 17 to monopolize” clearly satisfy Rule 8’s liberal pleading standard, largely because of Nuance’s
 18 market share. *See* Opp. at 4. However, since none of the predatory acts are sufficiently pleaded
 19 to support a claim, the fact that Abbyy USA has identified five such acts cannot save its claim
 20 from dismissal. An insufficiently pleaded claim that relies on bare legal conclusions is not
 21 magically rendered sufficient simply because it has been combined with other insufficiently
 22 pleaded claims. And as Nuance previously has explained, absent adequate allegations of
 23 predatory conduct, simply pleading that Nuance has a high market share is clearly not enough.¹
 24 Motion at 2-3.

25
 26
 27 ¹ Of course, Nuance does not concede that it has a high market share in any relevant market.
 28 Because the Complaint fails to allege any predatory acts that would give rise to a claim, there is
 no need to attack the Complaint as insufficiently pleaded on the issues of relevant product
 market and market share. Nuance does note that the Complaint fails to allege any facts to

(continued...)

1 **1. Exclusive Dealing**

2 Abbyy USA's primary argument is that its exclusive dealing claim cannot be dismissed
3 because Nuance's "dominant market power" is virtually dispositive. Opp. at 5-6. Abbyy USA
4 contends that Nuance's high market share requires the Court to "give[] greater scrutiny" to Abbyy
5 USA's exclusive dealing claims. See Opp. at 6. As discussed above, Nuance's market share,
6 without more, does not establish a violation of the Sherman Act. See *Trinko*, 540 U.S. at 407.
7 Abbyy USA cannot salvage its deficient exclusive dealing claim with bare allegations of high
8 market share.

9 Abbyy USA hides behind its market share allegation because it has nothing else to argue.
10 Nuance has explained that Abbyy USA's allegations of exclusive dealing are insufficient to
11 survive a motion to dismiss because they do no more than make the "bare legal conclusion" that
12 Nuance's exclusive contracts with "certain retail outlets" violate Section 2 of the Sherman Act
13 (and Section 1 of the Sherman Act as alleged in Abbyy USA's Eighth Claim). Motion at 3; see
14 *Kingray, Inc. v. NBA, Inc.*, 188 F. Supp. 2d 1177, 1196-97 (S.D. Cal. 2002) ("bare legal
15 conclusion" regarding exclusive dealing claim does not survive a motion to dismiss). As Nuance
16 previously explained, Abbyy USA does not allege what types of contracts are involved; with
17 whom Nuance contracted; how much of market the agreements foreclosed; the length of the
18 agreements; or whether there were alternative channels of distribution available to Abbyy USA or
19 its competitors. As another court in this Circuit has held, such conclusory allegations are clearly
20 insufficient to survive a motion to dismiss:

21 Plaintiff has failed to plead an exclusive dealing claim as it has failed to identify an
22 agreement with a specific person or entity and does not identify the parts, services,
23 or contracts involved in the alleged exclusive dealing. Antitrust pleadings are not
24 subject to more specificity than that required by Federal Rule of Civil Procedure 8,
25 a short and plain statement of the claim. However, failure to allege facts essential
26 to support the elements of the claim with a minimum level of detail warrants
27 dismissal of the claim.

28

 (...continued from previous page)
support the conclusion that its proposed relevant product market of "OCR Software" is indeed an
antitrust product market.

1 *JM Computer Servs., Inc. v. Schlumberger Techs., Inc.*, No. C 95-20349, 1996 WL 241607, at *4
 2 (N.D. Cal. May 3, 1996) (internal citation omitted).

3 Abbyy USA does not provide an explanation as to why its claims are not deficient given
 4 the pleading requirements set forth by courts in this Circuit. Significantly, Abbyy USA does not
 5 explain why its failure to allege how much of the market was foreclosed by these contracts or
 6 even what fraction of the total number of retail outlets were covered by such contracts with
 7 Nuance does not doom its exclusive dealing claim as a matter of law. *See Tampa Elec. Co. v.*
 8 *Nashville Coal Co.*, 365 U.S. 320, 328 (1961); *Omega Envtl. Inc. v. Gilbarco, Inc.*, 127 F.3d 1157
 9 (9th Cir. 1997); *see also Insignia Sys., Inc. v. News Corp., Ltd.*, No. 04-4213, 2005 WL 2063890,
 10 at *3 (D. Minn. Aug. 25, 2005) (“[A]bsent some indication of the percentage of the local,
 11 regional, or national markets that the 35,000 retail outlets allegedly under exclusive contract
 12 constitute, it is impossible to evaluate the percentage of the market with which Insignia and other
 13 competitors are prevented from doing business, let alone determine that Insignia and other
 14 competitors are prevented from dealing with a significant number of retailers.”); *Dickson*, 309
 15 F.3d at 209 (“[W]ith respect to the exclusive dealing component of Gravity’s claim,” the failure
 16 to allege that contracts “are likely to foreclose a significant share of the relevant software
 17 markets” is fatal to plaintiff’s claim.). In addition, Abbyy USA does not allege that such retail
 18 outlets are necessary to sell Full Text OCR to end-users as opposed to selling directly to end-
 19 users or licensing to OEMs or other software companies. *See* FAC ¶¶ 33-35²; *see Omega Envtl.*,
 20 127 F.3d at 1162-63. Abbyy USA does not even allege that Nuance’s exclusive contracts have
 21 prevented Abbyy USA from selling its own product to end-users. In fact, Abbyy USA admits in
 22 its Complaint that it sells its product through online retailers. *See* Motin at 4. Finally, while
 23 Abbyy USA alleges harm to itself, Abbyy USA does not allege harm to competition generally.
 24 *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990) (*quoting Brown Shoe Co. v.*
 25 *United States*, 370 U.S. 294, 320 (1962)); *see also Rutman Wine*, 829 F.2d at 734-35 (dismissing
 26

27 ² Citations to paragraphs alleged in the First Amended Complaint are abbreviated herein as
 28 “FAC ¶”.

1 claim where competitor alleged harm to itself and not to competition). Even accepting as true
 2 that Abbyy USA has been eliminated from “certain retail outlets,” this fact does not show harm to
 3 competition in the market generally, as the antitrust laws require, as opposed to specific harm to
 4 Abbyy USA.

5 In response, Abbyy USA makes the outlandish argument that Nuance contends that
 6 Abbyy USA must allege that it is “totally shut out by the exclusive contracts.” Opp. at 5. Such is
 7 not the case: Nuance has consistently taken the position that Abbyy USA must allege that the
 8 alleged exclusive contracts between Nuance and “certain retail outlets” foreclose a significant
 9 portion of the market—not the entire market. Abbyy USA has made no such allegations, and
 10 indeed makes no allegations that it was foreclosed from any meaningful portion of the market.

11 Abbyy USA suggests that even a small degree of foreclosure, such as “6.7%” or “10-15%,”
 12 is enough to raise a jury question.” See Opp. at 6. Abbyy USA misses the point: Abbyy USA
 13 fails to allege anywhere in its claim **any degree of foreclosure whatsoever**. Abbyy USA’s
 14 failure to allege any foreclosure at all is reason enough to dismiss this claim.³

15 Finally, Abbyy USA asserts that exclusive dealing “should not be viewed in isolation,”
 16 that “the relevant facts are often in possession of the defendant,” and “that this is a fact-sensitive
 17 inquiry that is not to be determined at the pleading stage.” Opp. at 6. There is no support for
 18 Abbyy USA’s interpretation of the law, and nowhere does Abbyy USA explain how viewing the
 19 exclusive dealing claim along with its other insufficiently pleaded allegations makes the exclusive
 20 dealing claim any more viable. *Id.* at 5-7. In short, Abbyy USA does not dispute Nuance’s
 21 arguments regarding the sufficiency of its claim; instead, it relies upon its argument that it should
 22 be relieved of any additional pleading requirements simply because it pleads that Nuance has a
 23 high market share. Fortunately, there is no precedent whatsoever to support Abbyy USA’s

24
 25 ³ Moreover, Nuance notes that modern exclusive dealing cases suggest that more than 6.7%
 26 foreclosure is required. See *Omega Envtl.*, 127 F.3d at 1162 (finding 38% foreclosure
 27 insufficient); see also *United States v. Microsoft Corp.*, 253 F.3d 34, 70 (D.C. Cir. 2001). The
 28 law concerning the legality of exclusive dealing was substantially different in the 1949 and 1971
 cases cited by Abbyy USA than it is today. Because Abbyy USA has failed to plead any degree
 of foreclosure at all, however, the Court need not consider Abbyy USA’s reliance on outdated
 jurisprudence in the context of this motion to dismiss.

1 interpretation of the law—an interpretation that would throw open the floodgates of litigation to
 2 any plaintiff who alleges no more than that a defendant has a high market share in some relevant
 3 product market.

4 2. **Agreements with Competitors**

5 The second “predatory act” alleged in Abbyy USA’s Sixth Claim is that Nuance “sought
 6 to reach agreement with competitors on pricing so that Nuance could raise prices without regard
 7 to market pressure.” FAC ¶ 38(b).

8 Remarkably, Abbyy USA asserts that it “never intended to allege a conspiracy, price-
 9 fixing, or an agreement between co-conspirators.” Opp. at 9. Abbyy USA’s interpretation of its
 10 claim defies comprehension: The claim alleges that Nuance “sought to reach agreement with
 11 competitors on pricing so that Nuance could raise prices without regard to market pressure.”
 12 FAC ¶ 38(b). If this allegation does not allege a conspiracy, or a price-fixing claim, or an
 13 agreement between co-conspirators, then it is unclear what exactly Abbyy USA believes it is
 14 alleging. Instead of explaining how the allegation of reaching agreement with competitors is
 15 sufficient to state a claim, Abbyy USA defends its position merely by explaining that this
 16 allegation is not to be interpreted as a conspiracy, a price-fix, or an agreement among competitors
 17 or “co-conspirators.” Because Abbyy USA does not provide an alternative interpretation of its
 18 allegation, Nuance refers the Court to the arguments made in its opening brief in support of its
 19 dismissal. *See* Motion at 7-9.

20 In addition, Abbyy USA asserts that “questions relating to antitrust injury generally are
 21 not amenable to resolution at the pleadings stage” because antitrust injury must be proven at trial.
 22 Opp. at 7 (*citing Haff v. Jewelmont Corp.*, 594 F. Supp. 1468, 1472 n.2 (N.C. Cal. 1984)). The
 23 question here, of course, is whether in this particular case Abbyy USA has alleged facts that, if
 24 true, establish that it has suffered antitrust injury. On this question, Supreme Court cases have
 25 long held that competitors do not suffer antitrust injury, and cannot recover damages, due to
 26 agreements by their competitors to charge higher prices. *See Matsushita*, 475 U.S. at 582-83; *Atl.*
 27 *Richfield Co.*, 495 U.S. at 337. Thus, Abbyy USA does not have antitrust standing and no
 28

1 amount of further discovery into its allegations of agreements among Nuance and its competitors
2 will change the law articulated in *Matsushita* and *ARCO*.

3 Abby USA suggests that it has antitrust standing under what it characterizes as a three-
4 part test in *Associate General Contractors*, 459 U.S. 519. As explained in detail in Nuance's
5 opening brief, there are actually six factors to be considered for antitrust standing. Motion at 6-7.
6 Abby USA wholly fails to address three of the six factors. Opp. at 7-8. On the three factors it
7 selectively chose to address, it makes unconvincing arguments in support of standing: Abby
8 USA claims that it suffered injury of the type Congress sought to redress through private antitrust
9 enforcement, because it suffered lost sales and profits. Unfortunately, Abby USA never
10 explains how an agreement among competitors to raise price would cause it to lose sales and
11 profits. Abby USA suggests that it could not benefit from increased prices because it was
12 "foreclosed from even competing in certain retail outlets." Opp. at 8. Even if Abby USA were
13 foreclosed from "certain retail outlets," that does not establish that Abby USA suffered antitrust
14 injury due to a conspiracy to raise prices and, in any event, Abby USA still has not alleged how
15 much of the market was foreclosed by Nuance's exclusive contracts.

16 3. Acquisition of Competitors

17 The third "predatory act" alleged in Abby USA's Sixth Claim is that Nuance "acquired
18 and sought to acquire competitors to reduce supply and raise prices." FAC ¶ 38(c). Nuance
19 explained that this allegation should be dismissed because Abby USA has failed to identify
20 which competitors Nuance acquired, when they were acquired, whether these competitors also
21 sold Full Text OCR software, what market share these competitors had, or whether any of these
22 acquisitions provided Nuance with market power. Motion at 14-15. Absent these facts, the
23 unremarkable allegation that Nuance has acquired competitors fails to state a claim.

24 In addition, as a matter of law, as a competitor, Abby USA does not have standing to
25 bring this claim. If true, as explained in its opening brief, Abby USA stood to benefit from the
26 alleged reduced supply and increased prices for Full OCR Text software resulting from the
27 alleged acquisitions of competitors and, therefore, Abby USA suffers no antitrust injury. *See*
28

1 *Matsushita*, 475 U.S. at 582-83. Therefore, even if this claim had otherwise alleged sufficient
 2 facts to state a claim, Abbyy USA would have no standing to pursue such a claim.

3 **4. Litigation Threats**

4 The fourth “predatory act” alleged in Abbyy USA’s Sixth Claim is that Nuance
 5 “threatened competitors and customers of competitors with increased litigation,” if said
 6 competitors refused to engage in anticompetitive conduct. FAC ¶ 38(d). As Nuance explained,
 7 this allegation is insufficient to state a claim because (1) it is not a violation of the antitrust laws
 8 to assert a valid legal claim under *Professional Real Estate Investors, Inc. v. Columbia Pictures*
 9 *Industries, Inc.*, 508 U.S. 49, 60 (1993), unless the lawsuit is “objectively baseless in the sense
 10 that no reasonable litigant could realistically expect success on the merits,” and (2) to the extent
 11 that this allegation suggests that Nuance sought to reach anticompetitive agreements with its
 12 competitors, the claim is insufficient under *Twombly* to state a claim. Motion at 10-11.

13 In response, Abbyy USA contends that “determination of whether the ‘sham litigation’
 14 exception ... applies in a particular case requires an analysis of whether the litigation in question
 15 was objectively baseless and done with the intent of interfering directly with the business
 16 relationships of a competitor.” Opp. at 10. Once again, Abbyy USA asserts that it should have
 17 recourse to discovery to resolve factual questions that are not even raised by its conclusory
 18 pleadings. Abbyy USA does not allege that Nuance ever engaged in “objectively baseless” or
 19 “sham litigation” or perpetrated any fraud of any kind. Thus, Abbyy USA should not be
 20 permitted to engage in discovery to support a contention that Nuance has engaged in “sham
 21 litigation” when the claim makes no such allegations. *See Syncsort Inc.*, 50 F. Supp. 2d at 334-35
 22 (dismissing “sham litigation” claim where defendant alleged that plaintiff engaged in “bringing
 23 [of] anti-competitive litigation,” “without offering examples”); *see also Viva Optique, Inc. v.*
 24 *Contour Optik, Inc.*, No. 03 Civ. 8948, 2007 WL 4302729, at *2 (S.D.N.Y. Dec. 7, 2007) (“The
 25 Amended Complaint is bereft of any factual allegation that would support a finding that the patent
 26 infringement claims that have been raised by Defendants in separate litigation are objectively
 27 baseless.”); *Marchon Eyewear, Inc. v. Tura LP*, No. 98 CV 1932, 2002 WL 31253199, at *8
 28 (E.D.N.Y. Sept. 30, 2002).

1 Even if Abbyy USA had alleged sham litigation, which it has not, such allegations would
2 need to include allegations of the “specific activities” that take the conduct outside the protection
3 of *Noerr-Pennington* immunity under the applicable heightened pleading that governs such “sham
4 litigation” claims. *See Oregon Natural Res. Council v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991)
5 (“Where a claim involves the right to petition governmental bodies under *Noerr-Pennington*,
6 however, we apply a heightened pleading standard.... [W]e required that the plaintiffs satisfy
7 more than the usual 12(b)(6) standard, holding that ‘a complaint must include allegations of the
8 specific activities’ which bring the defendant’s conduct into one of the exceptions to Noerr-
9 Pennington protection.... This heightened level of protection accorded petitioning activity is
10 necessary to avoid ‘a chilling effect on the exercise of this fundamental First Amendment right.’”) (internal citations omitted).

12 The two cases cited by Abbyy USA do not hold differently. *See Salomon S.A. v. Alpina*
13 *Sports Corp.*, 737 F. Supp. 720, 725 (D.N.H. 1990) (“The Court finds that these allegations
14 satisfy the standard of specificity necessary to sustain, at this initial stage, Alpina’s claim that
15 Salomon’s action was a ‘sham.’”); *SJ Advanced Tech. & Mfg. Corp. v. Junkunc*, 627 F. Supp.
16 572, 579 (N.D. Ill. 1986) (same). In both of those cases, the plaintiff pleaded that the litigation
17 was a “sham”—Abbyy USA has not. Although Abbyy USA does not contend that the standard to
18 determine whether litigation is a “sham” should be the one articulated in these cases, Nuance
19 notes that both cases cited by Abbyy USA have been overruled to the extent that they allow a
20 plaintiff to proceed to discovery regarding the defendant’s subjective intent in bringing a lawsuit
21 to prove that the litigation was a “sham” without first establishing that the litigation was
22 objectively baseless. The Supreme Court’s decision in *Professional Real Estate Investors* held
23 that “only if challenged litigation is objectively meritless may a court examine the litigant’s
24 subjective motivation.” 508 U.S. at 60; *see also Viva Optique, Inc.*, 2007 WL 4302729, at *2
25 (“Although Plaintiffs do allege that Defendants brought suit believing that the patents were
26 actually not infringed or invalid, Defendants’ subjective intent is irrelevant unless it is first found
27 that the challenged litigation is objectively meritless.”).

1 Moreover, Abbyy USA makes no attempt to respond to Nuance's second point—that to
2 the extent Abbyy USA is alleging that Nuance sought to reach anticompetitive agreements with
3 competitors, it has not pleaded sufficient facts under *Twombly*.

4 5. Patent Acquisitions

5 The final “predatory act” alleged in Abbyy USA’s Sixth Claim is that Nuance “acquired
6 patents covering OCR technology, with the purpose of substantially lessening competition in
7 software markets.” FAC ¶ 38(e). Nuance explained that this allegation is insufficient to state a
8 claim because it provides no basis to conclude that Nuance’s alleged patent acquisitions have
9 substantially lessened competition under Section 7 of the Clayton Act or have resulted in
10 monopolization under Section 2 of the Sherman Act. Motion at 11-12. Abbyy USA’s bare
11 allegation that Nuance has acquired patents covering OCR technology for the purpose of
12 substantially lessening competition is, again, a conclusory allegation that should be dismissed
13 under *Twombly*. Abbyy USA does not allege what patents were acquired, when they were
14 acquired, who they were acquired from, or what specifically they encompass. Secondly, Abbyy
15 USA does not allege any facts to establish that Nuance actually owned patents which when
16 combined with the patents it later acquired prevented competitors from entering the Full Text
17 OCR market or resulted in an increase in market power in violation of Section 2 of the Sherman
18 Act. In sum, Abbyy USA does not allege that any of these patent acquisitions resulted in Nuance
19 obtaining market power in Full Text OCR technology.

20 Finally, Abbyy USA cites *United States v. Microsoft* for the unremarkable proposition that
21 “[i]ntellectual property rights do not confer a privilege to violate the antitrust laws.” 253 F.3d at
22 63 (citation omitted). If Abbyy USA is suggesting that the government’s 50-plus page Complaint
23 detailing the anticompetitive conduct engaged in by Microsoft is similar to its one paragraph
24 allegation of Nuance’s alleged violations of the Sherman Act, its reliance on *Microsoft* is sorely
25 misplaced. Abbyy USA does not provide any explanation whatsoever as to why it need not allege
26 any basic facts regarding the allegedly acquired patents in order to state a claim under Section 2
27 of the Sherman Act. Once again, Abbyy USA would have this Court allow a plaintiff to sue and
28 proceed to discovery against any company with an alleged high market share and a patent

1 portfolio that was assembled, at least in part, through acquisition, without the need for any other
2 allegations. The Court should dismiss the insufficiently pleaded patent acquisition claims on this
3 ground as well.

4 **B. Seventh Claim**

5 In its Seventh Claim, Abbyy USA alleges that the conduct alleged in its Sixth Claim
6 amounted to attempted monopolization under Section 2 of the Sherman Act. *See* 15 U.S.C. § 2
7 (“Every person who shall monopolize, or attempt to monopolize...”). In its opening brief,
8 Nuance explained that this claim for attempted monopolization fails to state a claim for the same
9 reasons that the allegations of “predatory acts” asserted in the Sixth Claim failed to state a claim.
10 Motion at 12-13. Abbyy USA makes no effort to deny that whether the conduct alleged is
11 considered to be a violation of Section 2 as monopolization or attempted monopolization, the
12 claims are still insufficiently pleaded.

13 Nuance also explained in its opening brief that the allegations of the Seventh Claim
14 plainly contradicts Abbyy USA’s allegation in the Sixth Claim that the relevant market is the
15 United States, alleging instead that there are “certain geographic submarkets” within the United
16 States. *Id.* at 11. In its Opposition, Abbyy USA merely elaborates upon its allegations,
17 suggesting that perhaps Wyoming is a relevant market, not the United States as a whole. *Opp.* at
18 12. Abbyy USA does not provide any evidence that Nuance engaged in anticompetitive conduct
19 anywhere in the United States, and for that reason, its claims must be dismissed.

20 In any event, the problem with the Seventh Claim as alleged is not simply that Abbyy
21 USA contradicts its own initial allegations regarding the relevant market, but that Abbyy USA
22 does not allege any facts to support that Nuance had a dangerous probability of achieving market
23 power in the same “sub-markets” in which Abbyy USA admits Nuance did not have market power.
24 *See Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 893 (9th Cir. 2008) (“‘[T]o
25 demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged
26 in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a
27 dangerous probability of achieving monopoly power.’”) (alteration in original).

1 Finally, as Nuance explained in its opening brief, Abbyy USA's conclusory allegations
 2 that "there is a dangerous probability that Nuance will successfully achieve monopoly power in
 3 the market for Full Text OCR software products in those markets where it has not achieved actual
 4 monopolization," and that "Nuance has manifested a specific intent to monopolize the market for
 5 Full Text OCR software products," FAC ¶¶ 46-47, merely parrot the elements of attempted
 6 monopolization. Under the law, far more is required of Abbyy USA for this claim to survive a
 7 motion to dismiss. *See Twombly*, 127 S. Ct. at 1968; *SmileCare Dental Group*, 88 F.3d at 783.
 8 Thus, the underlying conduct at issue, which Abbyy USA alleged in its Sixth Claim, fails to state
 9 a claim, whether it is considered as actual monopolization or attempted monopolization.

10 C. Eighth Claim

11 Abbyy USA's Eighth Claim for exclusive dealing is identical to its allegation of exclusive
 12 dealing in its Sixth Claim and should be dismissed for the same reasons explained above.
 13 Because the considerations that apply to exclusive dealing claims under Sections 1 and 2 of the
 14 Sherman Act are similar, Nuance relies upon its arguments above to support the dismissal of this
 15 claim as well. *See Microsoft Corp.*, 253 F.3d at 70 (Section 1 exclusive dealing requirements
 16 stricter than under Section 2); *Omega Envtl.*, 127 F.3d at 1167 n.13 (same).

17 D. Ninth Claim

18 The Ninth Claim alleges the same conduct alleged in the Sixth Claim as a violation of
 19 Section 7 of the Clayton Act instead of Section 2 of the Sherman Act. For the reasons explained
 20 above and in Nuance's Opening Brief, this claim should be dismissed. Motion at 21-22.

21 More importantly, Abbyy USA asserts that while the acquisition of Caere Corporation in
 22 2000 did not violate Section 7, "Nuance's use of the assets acquired" from Caere violate Section
 23 7 and toll the four-year statute of limitations. Opp. at 13-14. *Midwestern Mach. v. Northwest*
 24 *Airlines, Inc.*, 392 F. 3d 265, 271-273 (8th Cir. 2004), makes a clear distinction between market
 25 power or foreseeable conduct known at the time of merger that flows naturally from the merger
 26 itself versus "new uses" of the assets acquired by the merger that cause injury to the plaintiff.
 27 *Midwestern Mach.*, 392 F. 3d at 271- 273 ("Even if the merger itself was unlawful, the continued
 28 existence of the merged entity is not a continuing violation: It is simply the natural unabated

1 inertial consequence of the merger.”). The leading antitrust law treatise interprets the *Midwestern*
 2 *Machinery* case in the same way:

3 In brief, under the Eighth Circuit ruling, the statute of limitation ordinarily runs on
 4 a merger from the date of acquisition ... the statute might not be tolled if the
 5 merger caused the plaintiff no injury at the time it occurred, but subsequently the
 6 acquired assets were used in an anticompetitive way not contemplated at the time
 of the acquisition and caused the plaintiff injury. Once again, this subsequent and
 new use must be causally linked to the merger.

7 Phillip Areeda & Herbert Hovenkamp, Antitrust Law § 320c5 (3d ed. 2007 & 2006 Supp.).

8 In this case, the Complaint asserts that after the Caere acquisition, “Nuance engaged in
 9 conduct such as that alleged above.” FAC ¶ 56. In its opposition, Abbyy USA does not explain
 10 how any of the conduct previously alleged constitutes a “new use” of the assets acquired from
 11 Caere in 2000. In fact there are no allegations as to what assets were acquired in Caere that
 12 subsequently allowed Nuance to engage in the alleged conduct. Abbyy USA makes no
 13 allegations that the assets acquired from Caere were “used in a different manner from the way
 14 that they were used when the initial acquisition occurred.” *Midwestern Mach.*, 392 F. 3d at 273.
 15 The Ninth Claim must therefore be dismissed.

16 **III. CONCLUSION**

17 For the foregoing reasons, Nuance respectfully requests that this Court dismiss Abbyy
 18 USA’s Sixth through Ninth Claims.

19
 20 Dated: August 1, 2008

WILSON SONSINI GOODRICH & ROSATI

21 By: _____/s/
 22 S. Michael Song

23 Attorneys for Defendant
 24 NUANCE COMMUNICATIONS, INC.